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NOTES

WARSAW CONVENTION—AIR CARRIER LIABILITY FOR PASSENGER INJURIES SUSTAINED WITHIN A TERMINAL

I. INTRODUCTION

The bombing of La Guardia airport¹ and the terrorist attack at Hellenikon Airport, Athens, Greece,² besides their tragic consequences, also raise the question of the scope of the air carrier's liability to passengers injured within an airport terminal. Airport terminals are usually owned and operated by a public authority which may not be liable under local law to injured passengers. The carrier's liability to its international passengers is governed by an international treaty known as the Warsaw Convention.³ Article 17 of the treaty, defining the scope of potential liability, provides:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.⁴

To the extent that air carriers are liable for injuries sustained within a terminal, therefore, the accident must be construed as having occurred during "*the operations of embarking or disembarking.*" The passenger's interest in application of the treaty lies in the fact that the Warsaw Convention, as modified by the Montreal Agreement,⁵ imposes a system of strict liability upon the airline. If a passenger is excluded from this umbrella of strict liability protection, only the tenuous and, at times non-existent, common law remedy for negligence remains.⁶

1. N.Y. Times, Dec. 30, 1975, at 1, col. 8.

2. N.Y. Times, Aug. 6, 1973, at 1, col. 6.

3. Convention for the Unification of Certain Rules Relating to International Transportation by Air, done October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 [hereinafter cited as Warsaw Convention].

4. Warsaw Convention, supra note 3, art. 17.

5. The Montreal Agreement is not a protocol to the original Warsaw Convention between governments; it is, rather, an agreement executed by international airlines accepting a liability in excess of that provided in the Warsaw Convention. The Montreal Agreement is officially entitled "Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol," CAB Agreement No. 18900, approved by CAB Order No. E-23680, May 13, 1966, 31 Fed. Reg. 7302 (1966) [hereinafter cited as Montreal Agreement]; see CAB Press Release No. 67-161 (Nov. 29, 1967); CAB Press Release No. 66-61 (May 13, 1966).

6. For an example of a case holding a carrier liable in negligence for injuries occurring within a terminal see *Suarez v. Trans World Airlines, Inc.*, 498 F.2d 612 (7th Cir. 1974), noted in 60 Iowa L. Rev. 710 (1975). The cause of action in negligence against a carrier has undergone a transformation since the Warsaw Convention was adopted in 1929. At the time the treaty was drafted, flying was considered an inherently dangerous activity and a defense available to the carrier was a passenger's assumption of the risk. 2 F. Harper & F. James, *The Law of Torts* § 14.13, at 846 (1956). This view has eroded to the point that many courts will now apply the

This Note will focus upon when a passenger is considered to be "in the course . . . of embarking or disembarking" so that the carrier's liability is governed by the Warsaw Convention.

II. THE HISTORY OF ARTICLE 17

A. *The Warsaw Convention*

The airplane was still considered something of a novelty when the international community began taking steps to regulate the mushrooming enterprise of commercial aviation.⁷ An international conference was convened in Warsaw, Poland, in October, 1929. The goals of this gathering were twofold: the establishment of a uniform system of liability governing international transportation of passengers and, perhaps of more direct concern to the delegates, the implementation of strict limitations upon the extent of the carrier's monetary liability.⁸ These concerns were reflected in the system of liability fashioned by the delegates, the principal features of which were a presumption of carrier liability which could be rebutted by a showing of due care and a limitation on the recovery which was restricted at that time to approximately \$8300.⁹

Although the United States was not officially represented at Warsaw, it became an adherent to the Convention in 1934.¹⁰ A letter, accompanying the Warsaw Convention to the Senate, from Secretary of State Cordell Hull, indicates that the goals of the drafters were shared by the United States government:

It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier

doctrine of *res ipsa loquitur* to an aviation accident. W. Prosser, *The Law of Torts* § 39, at 216 (4th ed. 1971).

Although beyond the scope of this Note, the holding in *Reed v. Wiser*, 414 F. Supp. 863 (S.D.N.Y. 1976) represents an interesting development in the case law construing the Warsaw Convention. The court found that while the Warsaw Convention prescribes the plaintiff's remedy against the carrier, it does not foreclose a claim in negligence against the carrier's employees.

7. 1 L. Kreindler, *Aviation Accident Law* § 11.01[2], at 11-2 (1974).

8. Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 498-99 (1967) [hereinafter cited as Lowenfeld]. The Preamble to the Warsaw Convention, *supra* note 3, reflects that the delegates "recognized the advantage of regulating in a uniform manner the conditions of international transportation by air in respect . . . of the liability of the carrier"

9. Warsaw Convention, *supra* note 3, art. 17, art. 20, para. 1, art. 22, para. 1; see Lowenfeld, *supra* note 8, at 500. The limitation amount remained at \$8300 until 1966. The French franc referred to in art. 22 is a gold franc; accordingly, the free market price of gold and two devaluations of the United States dollar have affected the exchange rate with the result that the \$8300 value is no longer accurate.

10. 1 L. Kreindler, *Aviation Accident Law* § 11.01[2], at 11-3 (1974).

and advantages to travelers and shippers in the way of reduced transportation charges.¹¹

It is uncertain to what extent the policy of protecting the airlines affected the resolution of the scope of the carriers' liability, *i.e.*, the point at which liability begins and ends. An earlier draft¹² of the Convention provided parallel liability for both passengers and goods "from the moment when travelers, goods or baggage enter in the aerodrome of departure to the moment when they leave the aerodrome of destination."¹³ This broad provision generated considerable debate among the delegates. It was proposed that liability be limited to the period when passengers were physically aboard the aircraft;¹⁴ other delegates expressed concern, however, that this would exclude the embarkation period.¹⁵ Another criticism of the draft proposal was that it imposed liability upon the carrier for accidents within the terminal while the passenger was not within the carrier's control.¹⁶ The French delegate argued that, in light of the innumerable factual situations which might arise, no attempt should be made to define precisely the scope of the carrier's liability.¹⁷ He suggested the criteria of "course of carriage," indicating that further definition would result from judicial determinations.¹⁸ The delegates voted to reject the draft proposal without, however, agreeing upon a substitute provision.¹⁹ Article 17 was redrafted by a committee and subsequently adopted without debate in its present form.²⁰

Several of the delegates to the conference and other experts on the treaty have expressed their interpretation of "in the course of any of the operations of embarking or disembarking." For example, the Italian²¹ and German²² delegates favored a narrow construction, limiting carrier liability to the immediate area of the airplane. Goedhuis, president of a later international air conference held at The Hague in 1955, presented a paper at the Fifth

11. Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules, Sen. Exec. Doc. No. G, 73d Cong., 2d Sess. 3-4 (1934).

12. The Warsaw delegates had before them a draft convention prepared by the interim committee, Comité International Technique d'Experts Juridique Aériens (CITEJA), appointed at the initial international conference in Paris in 1925. Lowenfeld, *supra* note 8, at 498.

13. Second International Conference on Private Aeronautical Law, October 4-12, 1929, Warsaw, Minutes 264 (R. Horner & D. Legrez transl. 1975) [hereinafter cited as Warsaw Minutes]. This parallels the provisions of the Harter Act, regarding a carrier's liability for carriage of goods by sea from the time the goods have been taken in charge at the port of loading until the time of delivery at the port of discharge. 46 U.S.C. §§ 190-96 (1970).

14. Warsaw Minutes, *supra* note 13, at 70-71.

15. *Id.* at 80.

16. *Id.* at 73, 80.

17. *Id.* at 78.

18. *Id.*

19. *Id.* at 80-83. There was some confusion centering upon whether rejection of the draft provision acted as an adoption of the French delegate's proposal. *Id.* at 83-84.

20. *Id.* at 205-06.

21. A. Giannini, *Saggi di Diritto Aeronautico* 233 (1932).

22. O. Riese & J. Lacour, *Précis de Droit Aérien* 265 (1951).

International Congress on Air Navigation, in 1930, urging "broad" construction of the provision so that passengers' movements from the terminal to the airplane might be included.²³ Sullivan, an American authority on the Convention, has noted the difficulty in drawing a line at which liability commences. Therefore, he would define liability with reference to the type of hazard presented, considering a passenger covered when exposed to risks inherent to aviation. Under this formulation, Sullivan would exclude the area within the terminal, while including that between the terminal and the aircraft.²⁴ Similarly, another commentator approved extension of liability to the period of walking to or from the aircraft.²⁵ Two current English authorities offer a still broader construction, interpreting article 17 as extending coverage to passengers while they are in the control of the carrier, thus leaving open the question of whether injuries occurring within the terminal fall within the ambit of article 17.²⁶

Thus, aviation experts have not reached a consensus on the meaning of article 17. Their opinions differ depending upon the factor stressed—whether it is the passenger's location, the carrier's control or the type of hazard presented.

B. *The Montreal Agreement and the Guatemala Protocol*

Opposition to the Warsaw scheme of liability—limitation on amount and exoneration if due care were shown—mounted rapidly in this country.²⁷ Dissatisfaction ultimately led the United States to file a formal notice of denunciation of the Warsaw Convention in 1965.²⁸ A contemporaneously

23. Goedhuis, *Observations Concerning Chapter 3 of the Convention of Warschau 1929*, in *Cinquième Congrès International de la Navigation Aérienne*, at 1163-64 (1931). Goedhuis' view was advanced in response to those urging "narrow" construction to limit article 17 to the act of getting on or off the aircraft. *Id.* at 1172.

24. Sullivan, *the Codification of Air Carrier Liability by International Convention*, 7 *J. Air L. & Com.* 1, 20-21 (1936). Sullivan refused to state his rule in terms of the passenger's physical location since the layouts of airports differ. *Id.* at 21.

25. H. Drion, *Limitation of Liabilities in International Air Law* 83 (1954). Drion pointed out that the implementing legislation of several countries limited liability to the moment of getting on or off the aircraft. *Id.* at 83 n.73.

26. 1 Shawcross and Beaumont on *Air Law* 441-42 (3d ed. P. Keenan, A. Lester & P. Martin eds. 1966). See also N. Matte, *Traité de Droit Aérien-Aéronautique* 404-05. (2d ed. 1964).

27. The Warsaw Convention was sharply criticized by Senator Robert Kennedy from the floor of the Senate. 111 Cong. Rec. 20164 (1965). See generally H. Sherman, *The Social Impact of the Warsaw Convention* (1952). At the urging of the United States, an international conference was convened at The Hague in 1955. It produced the Hague Protocol which had the primary effect of raising the limitation on liability to approximately \$16,600 plus an additional allowance for attorney's fees. Although submitted to the Senate in 1959, it never reached the floor for a vote. See generally 1 L. Kreindler, *Aviation Accident Law* §§ 12.01-03 (1974); Lowenfeld, *supra* note 8, at 504-16.

28. The text of the denunciation was reprinted in a contemporaneously issued press release. Dep't of State Press Release No. 268 (Nov. 15, 1965), 53 Dep't State Bull. 923, 924-25 (1965). Under article 39 of the Warsaw Convention, the denunciation would take effect six months from the date of its filing. Warsaw Convention, *supra* note 3, art. 39, para. 2.

issued press release from the State Department indicates the reasons prompting denunciation:

[T]he United States wishes to make clear that the action to denounce the Warsaw Convention is taken solely because of the convention's low limits of liability for injury or death to passengers, and in no way represents a departure from the longstanding commitment of the United States to the tradition of international cooperation in matters relating to civil aviation.²⁹

Intense negotiation followed, seeking to prevent the virtual disintegration of international air law which would result from the withdrawal of one of the Convention's most powerful members.

The resulting Montreal Agreement is essentially a unilateral contract signed by many of the major international carriers, waiving the Convention's limitation of monetary recovery up to \$75,000 and imposing a system of strict liability.³⁰ Shortly after the Montreal Agreement was signed, the United States withdrew its denunciation, thereby continuing within the Convention's scheme of limited liability.³¹

The system of strict liability introduced by the Montreal Agreement for consenting carriers has been incorporated into the Guatemala Protocol.³² The product of a 1971 international conference, it amends the Warsaw Convention and provides for absolute liability up to \$100,000.³³ The Protocol's legal effect is, however, conditioned on United States approval and the Senate, as of this writing, has not ratified it.³⁴ At the conference, the French delegate proposed replacing the words "in the course of any of the operations of embarking or disembarking" in article 17 with "in the movement area." He indicated that the purpose of the change was to foreclose the possibility of overly broad

29. Dep't of State Press Release No. 268 (Nov. 15, 1965), 53 Dep't State Bull. 923, 924 (1965). The press release also indicated that the United States was prepared to withdraw its denunciation if a new international agreement would raise the limitation to "the area of \$100,000." *Id.*

30. See note 5 *supra*. See generally 1 L. Kreindler, *Aviation Accident Law* ch. 12A (1974).

31. Dep't of State Press Release No. 110 (May 13, 1966), 54 Dep't State Bull. 955 (1966). The press release stated that "[t]he Department of State . . . has concluded that the interests of the United States traveling public and of international civil aviation would be best served by continuing within the framework of the Warsaw Convention . . ." *Id.* at 955

32. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955, signed March 8, 1971, I.C.A.O. Doc. No. 8932 (1971) [hereinafter cited as *Guatemala Protocol*].

33. Mankiewicz, *The 1971 Protocol of Guatemala City to Further Amend the 1929 Warsaw Convention*, 38 J. Air L. & Com. 519, 523 (1972). A novel approach to the problems inherent in limitation on recovery is presented by the Supplemental Compensation Plan which has been proposed to the Civil Aviation Board. The plan creates an additional fund of \$200,000 which would be available to American passengers. The additional insurance costs would be passed on to American passengers through a surcharge to the ticket price. 175 N.Y.L.J., Jan. 16, 1976, at 2, col. 1.

34. See 175 N.Y.L.J., Feb. 20, 1976, at 1, col. 1. The debate over the desirability of any limitation upon monetary recovery continues with several bar associations and a consumer group urging rejection of the Guatemala Protocol. 175 N.Y.L.J., Feb. 20, 1976, at 4, cols. 1-3.

judicial construction.³⁵ The delegates rejected the amendment and reindorsed the current language of article 17.

This brief history of article 17 demonstrates that while the essential feature of the Warsaw Convention—an international scheme of limited liability—has been attacked, it has not been discarded. The Montreal Agreement effected a raise in the limitation ceiling—a course followed in the Guatemala Protocol. The continuous adherence of the United States to the Warsaw Convention reflects this country's willingness to remain a member of the international air law community. Its adoption of the Montreal Agreement, however, indicates that the membership will be on its own terms, reflecting the fact that United States citizens have been the largest national passenger group in international aviation.

III. THE SCOPE OF THE CARRIER'S LIABILITY

A. *Disembarkation: Termination of Carrier Liability*

Several cases have construed the meaning of "disembarking" as used in article 17. In *MacDonald v. Air Canada*,³⁶ the elderly plaintiff inexplicably fell in the baggage collection area of the terminal.³⁷ The First Circuit held alternately that no "accident" had occurred within the meaning of article 17 and that the plaintiff had disembarked. With reference to the latter ground of its holding, the court apparently interpreted the scope of article 17 by looking to the passenger's location at the time of injury, and indicated that liability does not exist when a passenger "has reached a safe point [within] the terminal."³⁸ Reference to the policies underlying the Warsaw Convention reinforced its decision, since neither the goal of protection of a developing industry nor the presumption of carrier liability "applies to accidents which are far removed from the operation of aircraft."³⁹

*Felismina v. Trans World Airlines, Inc.*⁴⁰ illustrates an airline's attempt to use the Warsaw Convention defensively by urging application of its two-year

35. FitzGerald, *The Revision of the Warsaw Convention*, 8 Can. Y.B. Int'l L. 284, 293 (1970). "Movement area" was defined as "that part of an aerodrome intended for the surface movement of aircraft, including the manoeuvring area and aprons." *Id.* at 293 n.26. In rejecting the proposal, some delegates indicated that passengers in most modern airports never enter the "movement area" and, in any event, courts had interpreted article 17 relatively accurately. *Id.* at 293. See FitzGerald, *The Guatemala City Protocol to Amend the Warsaw Convention*, 9 Can. Y.B. Int'l L. 217, 220-21 (1971) for other rejected proposals.

36. 439 F.2d 1402 (1st Cir. 1971); accord, *Klein v. KLM Royal Dutch Airlines*, 46 App. Div. 2d 679, 360 N.Y.S.2d 60 (2d Dep't 1974). The Klein decision contains only the skeletal fact that a conveyor belt caused the infant plaintiff's injuries. The court, relying upon the MacDonald case, held that once a passenger has reached the terminal, the process of disembarkation has ended. 46 App. Div. 2d at 679, 360 N.Y.S.2d at 62.

37. No attempt was made at the trial to determine the cause of the fall. 439 F.2d at 1404.

38. *Id.* at 1405.

39. *Id.* The court noted the existence of the Montreal Agreement only parenthetically and failed to discuss its possible impact upon the original policies underlying the Warsaw Convention. *Id.*

40. 13 Av. Cas. ¶ 17,145 (S.D.N.Y. 1974).

statute of limitations⁴¹ to bar a claim for injuries occurring within the terminal. Noting that the case was one of first impression, the court denied defendant's motion for summary judgment and held that the Warsaw Convention did not apply because the plaintiff had finished disembarking when she fell on a terminal escalator.⁴²

The issue recurred in *In re Tel Aviv*,⁴³ a case concerning the 1972 terrorist attack in Lod Airport, Tel Aviv. The attack occurred within the terminal while the passengers were waiting for their baggage.⁴⁴ Refusing to apply the Warsaw Convention, the court indicated it considered *MacDonald* to be a "case substantially on all fours with the present actions,"⁴⁵ and denied relief. However, since the First Circuit had failed to refer to the Convention's legislative history, the court examined the minutes of the conference and construed the delegates' debate on article 17 as evidencing an intent to exclude from coverage all injuries sustained within the terminal. It found further support in subsequent interpretations of the provision advanced by both delegates and aviation experts.⁴⁶

The issue of when a passenger has finished disembarking has been adjudicated by the French courts. In *Mache v. Air France*,⁴⁷ the plaintiff fell while being led by two of defendant's stewardesses from the aircraft to the terminal. The plaintiff sought to avoid application of the Warsaw Convention by arguing that its intended scope encompassed only accidents occurring on the steps of the aircraft.⁴⁸ The court rejected this argument and, following an

41. Warsaw Convention, *supra* note 3, art. 29, para. 1.

42. 13 Av. Cas. at ¶ 17,145. The action was dismissed by stipulation of the parties on Nov. 29, 1974. (S.D.N.Y. docket entry).

43. 405 F. Supp. 154 (D.P.R. 1975). Both sides had cross-moved for summary judgment on the issue of the applicability of the Warsaw Convention.

44. *Id.* at 155.

45. *Id.* at 156. One of the alternate grounds of the *MacDonald* holding was that no "accident" had occurred. In *re Tel Aviv* did not present this issue since the defendant conceded that a terrorist attack constituted an accident. *Id.* at 155.

Courts have generally recognized that a terrorist attack qualifies as an "accident" as the term is used in article 17. See *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322, 1323 (C.D. Cal. 1975); *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152, 1154 (D.N.M. 1973); *Husserl v. Swiss Air Transport Co.*, 351 F. Supp. 702, 707 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973) (*per curiam*); *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385, 390 n.4, 314 N.E.2d 848, 851 n.4, 358 N.Y.S.2d 97, 102 n.4 (1974).

46. 405 F. Supp. at 158.

47. [1968] D.S. Jur. 515, [1967] *Revue Francaise de Droit Aérien* 343 (Cour d'appel, Rouen), *aff'd*, [1971] D.S. Jur. 373, [1970] *Revue Francaise de Droit Aérien* 311 (Cass. civ. 1re). The Cour de Cassation, sometimes called Cour Suprême, is the highest appellate court of France. The court's review is limited to questions of law and, if it reverses, the case must be remanded for further proceedings. P. Herzog, *Civil Procedure in France* 158 (1967).

The original trial court in Paris had held the Warsaw Convention applicable. The Cour de Cassation, although viewing the accident as one occurring during disembarking, reversed and remanded to the appellate court of Rouen for a specific finding that the injuries resulted from risks inherent to aviation. [1966] Bull. Civ. I. 29, [1966] *Revue Francaise de Droit Aérien* 228; see summary of holding in 33 J. Air. L. & Com. 207-08 (1967).

48. [1966] Bull. Civ. I. at 30, [1966] *Revue Francaise de Droit Aérien* at 229.

examination of the legislative history, focused instead upon whether the injuries resulted from a risk inherent to aviation. Concluding that the injuries did not fall within this category, the court refused to apply the treaty.⁴⁹

Thus, courts defining "disembarking" have consistently refused to extend the coverage of the Warsaw Convention to encompass injuries occurring within the terminal. The principle, announced in *MacDonald* and followed by the courts in *Felismina* and *Tel Aviv*, created a standard which emphasized the passenger's location, thereby ending liability when the passenger has reached a "safe" point within the terminal. All the disembarkation cases raise the issue of whether the factor of location should similarly circumscribe definitions of the process of embarking.

B. Embarkation: Threshold of Carrier Liability

In *Day v. Trans World Airlines, Inc.*,⁵⁰ the Second Circuit affirmed a district court holding⁵¹ that passengers injured during a terrorist attack within an airport terminal were "embarking" as the term is used in article 17. At the time the attack occurred, the plaintiffs⁵² had completed all the steps necessary for boarding except the mandatory physical search of their persons.⁵³ In an opinion by Chief Judge Kaufman, the court of appeals refused to construe article 17 as defining "embarking" solely by reference to a passenger's location and approved the district court's development of "a tripartite test based on activity (what the plaintiffs were doing), control (at whose direction) and location"⁵⁴

The court began its analysis by examining the language of article 17. Noting that the official text of the Warsaw Convention is in French,⁵⁵ the Second Circuit found that the French meaning⁵⁶ of the provision did not differ from that of its English translation⁵⁷ and observed that while the "cryptic phrase" of "in the course of embarking" made no attempt to define

49. [1968] D.S. Jur. at 516, [1967] *Revue Francaise de Droit Aérien* at 345.

50. 528 F.2d 31 (2d Cir. 1975), cert. denied, 45 U.S.L.W. 3280 (U.S. Oct. 12, 1976) (No. 75-1354). The order appealed from granted summary judgment to plaintiffs on the issue of the applicability of the Warsaw Convention. The Second Circuit holding was adopted by a New York court in *Leppo v. Trans World Airlines, Inc.*, Index No. 21770-1973 (Sup. Ct., N.Y. County, Mar. 10, 1976).

51. *Day v. Trans World Airlines, Inc.*, 393 F. Supp. 217 (S.D.N.Y.), aff'd, 528 F.2d 31 (2d Cir. 1975), cert. denied, 45 U.S.L.W. 3280 (U.S. Oct. 12, 1976) (No. 75-1354).

52. Three cases were consolidated at both the district and circuit levels.

53. 528 F.2d at 32; 393 F. Supp. at 219-20.

54. 528 F.2d at 33.

55. Article 36 states that the treaty is "drawn up in French in a single copy." Warsaw Convention, *supra* note 3, art. 36. The treaty is printed in French in the Statutes at Large. 49 Stat. 3000.

56. American courts generally accord the French text controlling status. See, e.g., *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 330 (5th Cir. 1967), cert. denied, 392 U.S. 905 (1968). However, confusion persists as to the extent of the control. This issue will be discussed with reference to its impact upon the goal of uniformity in international air law; see notes 110-32 *infra* and accompanying text.

57. 528 F.2d at 33 & n.7.

the period of coverage, it did focus upon actions rather than location.⁵⁸ Emphasizing that the passengers' actions were performed at the direction of the carrier,⁵⁹ the court concluded that the plaintiffs had satisfied the requirements of article 17.

In examining the legislative history of the Convention, the court interpreted the delegates' rejection of parallel liability for passengers and goods⁶⁰ as not necessarily evidencing an intent to exclude all injuries occurring within the terminal from coverage. Instead, the court viewed the delegates' rejection of the draft provision as a repudiation of a rigid location-based test in favor of a more fluid one, thereby leaving the courts free to define its perimeters.⁶¹

Moreover, the Second Circuit viewed the United States denunciation of the Convention and the formulation of the Guatemala Protocol as reflecting a change in the parties' attitude toward the treaty.⁶² Therefore, the court concluded, "the protection of the passenger ranks high among the goals which the Warsaw signatories now look to the Convention to serve."⁶³ However, the court also stated that had its analysis been limited to evaluating the parties' intent and purposes as of 1929, its decision would remain unchanged. In its opinion, the drafters of the Warsaw Convention intended a broad framework covering not only known, but also future, unknown hazards of air travel.⁶⁴

Subsequent to the Second Circuit's decision in *Day*, the Third Circuit reached an identical result in *Evangelinos v. Trans World Airlines, Inc.*,⁶⁵ a case arising from the same terrorist incident. Reversing the district court,⁶⁶

58. *Id.* at 33.

59. This factor, in the court's opinion, rendered the First Circuit's holding in *MacDonald* distinguishable in that there the plaintiff was not acting at the direction of the defendant airline. *Id.* at 34 n.8.

60. See notes 12-20 *supra* and accompanying text.

61. 528 F.2d at 35. While the court noted several of the delegates' subsequent statements of their understanding concerning the meaning of article 17, it did not accord them greater weight than those of other aviation experts. In fact, the court indicated that because these statements antedated negotiation of the Montreal Agreement, they were not necessarily consistent with the current expectations of the parties with regard to the Warsaw Convention. *Id.* at 37 n.17; see notes 21-26 *supra* and accompanying text.

62. 528 F.2d at 35-37. The Second Circuit recognized that airlines, not their respective governments, are the signatories of the Montreal Agreement. Nevertheless, the court construed the governments' acquiescence to the Agreement as conduct by parties to the Warsaw Convention evidencing approval of a system of strict liability. *Id.* at 36 n.15. This conclusion tacitly recognized the state ownership of many international carriers.

63. *Id.* at 37. The court buttressed its view of a shift in attitude toward passenger protection by reference to modern theories of tort law which impose liability on the party most capable of preventing the injuries and bearing the loss. *Id.* at 34.

64. *Id.* at 37-38.

65. No. 75-1990 (3d Cir., May 4, 1976), motion for rehearing en banc granted, (June 3, 1976) [hereinafter cited as *Evangelinos Slip Opinion*].

66. *Evangelinos v. Trans World Airlines, Inc.*, 396 F. Supp. 95 (W.D. Pa. 1975), rev'd, No. 75-1990 (3d Cir., May 4, 1976), motion for rehearing en banc granted, (June 3, 1976). The district court decision in *Evangelinos* was subsequent to the lower court decision in *Day*, but prior to the affirmance by the Second Circuit. It reached an opposite result from *Day* by defining article 17

the majority emphasized the need for uniformity in cases interpreting treaty provisions. It applied the tripartite test developed by the Second Circuit and examined the nature of the activity in which the plaintiffs were engaged, finding it a prerequisite to boarding. Noting that the plaintiffs acted at the direction of the airline, the court concluded that the defendant had assumed control over the passengers prior to the attack.⁶⁷ The majority distinguished the disembarkation cases by observing that in those situations the carrier's control over the passengers was not as extensive. In addition, the court differed with the premise underlying the disembarkation cases—that a passenger by arriving in the terminal has reached a point far removed from the dangers encountered in air travel—since it viewed terrorism as a closely associated risk.⁶⁸ Because the court believed its standard for liability referring to activity, location and control to be fully consistent with the Warsaw delegates' rejection of blanket liability within the terminal, it discounted the defendant's argument that location was the controlling factor acting automatically to exclude all accidents occurring within the terminal.⁶⁹

Chief Judge Seitz wrote a dissenting opinion in which he reasoned that the fundamental policy underlying the adoption of the Warsaw Convention—protection of the infant airline industry—had crystallized into a desire to protect passengers only from those risks uniquely associated with air travel.⁷⁰ The dissent would have defined the scope of the carrier's liability with reference initially to location as controlling whether a passenger would be likely to encounter such a risk, followed by an examination of the passenger's activity to determine whether it was a type intended to be covered by article 17. While viewing skyjacking as a danger associated with air travel, the dissent did not consider terrorism within the airport in a similar light since its site was largely fortuitous.⁷¹ Finding that the plaintiffs had failed to meet even the threshold location test, the dissent considered unnecessary any examination of the type of activity in which they were engaged.⁷²

In addition to these two decisions of American courts, the Court of Appeal of Berlin has resolved a case involving a passenger injured while embarking. In *Blumenfeld v. BEA*,⁷³ the court held the Warsaw Convention applicable to injuries received in a fall down a flight of stairs leading from the terminal to the traffic apron. Refusing to limit the application of the Warsaw Convention solely to risks inherent to aviation, the court determined that it encompassed all injuries sustained after the carrier requests its passengers to board the

solely with reference to location. The court viewed the delegates' rejection of the draft proposal as tacit approval of a location-based test. *Id.* at 101. The court reasoned that the disembarkation cases were indistinguishable because "many of the steps involved in embarkation . . . are just as essential, although in reverse, to the steps one must take in disembarking." *Id.* at 102.

67. Evangelinos Slip Opinion, *supra* note 65, at 5-6.

68. *Id.* at 6-7.

69. *Id.* at 7-10.

70. *Id.* at 10-11.

71. *Id.* at 12.

72. *Id.* at 20-22.

73. 11 ZLW 78 (Court of Appeal of Berlin 1962).

aircraft. The holding turned upon the rationale that a passenger is committed to the airline's care while travelling from the waiting area to the aircraft.⁷⁴

IV. ANALYSIS

Under the Constitution of the United States,⁷⁵ an international treaty is the supreme law of the land, preempting conflicting state law and policy.⁷⁶ An eminent jurist identifies the following factors as relevant in judicial construction of treaties:

(a) the text of the treaty expressing the agreement of the parties,¹⁷⁷ (b) the intention of the parties, as a subjective element,¹⁷⁸ and (c) the object and purpose¹⁷⁹ of the treaty.⁸⁰

A. *The Language*

The language of a treaty provides an almost mandatory starting point for an analysis of its terms.⁸¹ The delegates did not attempt to limit through definition the broad language of "in the course of any of the operations of embarking or disembarking." Thus, the phrase provides little guidance to a court faced with applying its terms.

The Second Circuit, while finding the phrase "cryptic," thought it significant that the delegates cast the scope provision in terms of the passengers' activities.⁸² The *Evangelinos* majority agreed.⁸³ In contrast, the First Circuit

74. Id. at 79-80.

75. U.S. Const. art. VI, cl. 2.

76. *Smith v. Canadian Pac. Airways, Ltd.*, 452 F.2d 798, 801 (2d Cir. 1971); L. Wildhaber, *Treaty-Making Power and the Constitution* 195 (1971).

77. Vienna Convention on the Law of Treaties, art. 31, para. 1, opened for signature May 23, 1969, 63 Am. J. Int'l L. 875, 885 (1969) [hereinafter cited as Vienna Convention]; T. Elias, *The Modern Law of Treaties* 73 (1974).

78. E.g., *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943); *Factor v. Laubenheimer*, 290 U.S. 276, 293 (1933); A. McNair, *The Law of Treaties* 365 (1961). McNair states that the fundamental object of treaty interpretation is to give effect to the intention of the parties "as expressed in the words used by them in the light of the surrounding circumstances." Id. at 365 (emphasis omitted); see Draft Convention on the Law of Treaties, with Comment, 29 Am. J. Int'l L. 653, 940, 944-45 (Supp. 1935) [hereinafter cited as Harvard Research]; Restatement (Second) of Foreign Relations Law of the United States § 146 (1965).

79. "A treaty is to be interpreted in the light of the general purpose which it is intended to serve." Harvard Research, *supra* note 78, art. 19(a), at 937; see id. at 948-53.

80. T. Elias, *The Modern Law of Treaties* 72 (1974); see Schreuer, *The Interpretation of Treaties by Domestic Courts*, 45 Brit. Y.B. Int'l L. 255, 272 & n.1 (1971).

81. See, e.g., *Clark v. Allen*, 331 U.S. 503, 513-14 (1947). Some authorities recognize a distinction between the terms "interpretation" and "application," defining the former as the process of determining the meaning of a provision and the latter as the process of applying a known meaning to a set of facts to determine the consequences which should follow. Harvard Research, *supra* note 78, at 938; A. McNair, *The Law of Treaties* 365 n.1 (1961). The terms are used interchangeably in this Note. See also Vienna Convention, *supra* note 77, at art. 31, para. 1.

82. *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 33-34 (2d Cir. 1975), cert. denied, 45 U.S.L.W. 3280 (U.S. Oct. 12, 1976) (No. 75-1354); see *Day v. Trans World Airlines, Inc.*, 393 F. Supp. 217, 222 (S.D.N.Y. 1975).

83. *Evangelinos* Slip Opinion, *supra* note 65, at 5. The dissent in *Evangelinos* did not separately consider the text.

in *MacDonald*, the leading disembarkation case, construed the "ordinary meaning" of the phrase as excluding all accidents occurring within the terminal.⁸⁴ All three courts supported their holdings by reference to factors other than the language of article 17.⁸⁵

Where the meaning of a provision is evident, that meaning controls and a court's analysis should cease at that point.⁸⁶ However, where differing constructions are equally tenable, the court should resort to the extrinsic aids of legislative history and policy considerations.⁸⁷ Since the differing constructions made by the courts in the embarking and disembarking cases indicate that article 17 is such a provision, sources extrinsic to the text must be examined.

B. *The Delegates' Intent*

Both the *Day* and *Evangelinos* courts examined the legislative history of article 17. With the notable exception of *MacDonald*, significant decisions in the disembarkation context have done the same.⁸⁸

As previously discussed, an earlier draft of article 17 had provided blanket coverage for both passengers and goods while within the terminal.⁸⁹ While this broad coverage was accepted for baggage, its extension to passengers provoked considerable debate at the conference which resulted in the current language of article 17.⁹⁰

The Second Circuit construed the delegates' rejection of parallel coverage for baggage and passengers as a rejection of a location-based test, rather than a blanket exclusion from coverage of all accidents occurring within the terminal. This view was consistent with its characterization of the delegates' debates as evincing a desire for judicial definition of the scope of article 17.⁹¹ The Third Circuit majority similarly reasoned that an intent to exclude all terminal accidents would have led to incorporation of a specific provision to that effect.⁹² However, these conclusions may rest upon a somewhat selective reading of the Warsaw minutes.

It is true that the French delegate who proposed the open-ended language which ultimately became the source of the official text favored judicial definition of its limits. However, his remarks focused upon his suggested criterion of "in the course of carriage."⁹³ Issues discussed in subsequent debates suggest that at least some of the delegates viewed this standard as having considerably less scope of application than the embarking/

84. 439 F.2d at 1405; see text accompanying notes 36-39 *supra*.

85. See text accompanying notes 39, 60-64, & 67-69 *supra*.

86. *Maximov v. United States*, 373 U.S. 49, 54 (1963); Harvard Research, *supra* note 78, at 940.

87. See notes 78-80 *supra* and accompanying text.

88. See notes 46, 49 *supra* and accompanying text.

89. See text accompanying note 13 *supra*.

90. See text accompanying notes 14-20 *supra*.

91. 528 F.2d at 35 & n.12.

92. *Evangelinos Slip Opinion*, *supra* note 65, at 8-9.

93. See note 18 *supra* and accompanying text.

disembarking test ultimately adopted.⁹⁴ Therefore, it seems preferable to view the delegates' statements as inconclusive on whether or not they would have favored judicial expansion of a provision made more flexible after its reference to the drafting committee.⁹⁵ The same may be said of the Third Circuit's conclusion that the delegates' failure to exclude the terminal area indicated an intent to include it when appropriate. The delegates did not always specifically exclude questionable situations from the scope of the Warsaw Convention.⁹⁶ Their failure could have proceeded as easily from a belief that embarking occurred only within the immediate vicinity of the aircraft.⁹⁷ The dissent adopted this construction of the delegates' debate.⁹⁸

The court in *In re Tel Aviv*⁹⁹ construed article 17 in a disembarking context and concluded that while some uncertainties remained, the delegates' rejection of parallel liability for both passengers and goods conclusively established a desire to exclude the terminal area.¹⁰⁰

Both the *Evangelinos* dissent and the court in *Tel Aviv* relied upon interpretations of article 17 voiced by former delegates to the Warsaw conference and other aviation experts of the period.¹⁰¹ These statements conclusively reflect several of the delegates' intent to limit coverage to the area near the aircraft.¹⁰² The Second Circuit, while accepting their relevance, chose to rely, instead, upon opposite interpretations advanced by current authorities.¹⁰³

Some courts have criticized resort to noncontemporaneous statements as indicia of legislative intent.¹⁰⁴ However, once a court ignores this more conservative approach and considers such extrinsic sources, subsequent statements by the delegates would appear to be more reliable than those of other authorities. Therefore, it was somewhat ingenuous of the Second Circuit to dismiss the delegates' statements simply because they antedated the United States denunciation of the Convention.¹⁰⁵

94. The French delegate's proposal was characterized as extending liability only to those who had completed the process of embarkation. Warsaw Minutes, *supra* note 13, at 81. For example, the Italian and Belgian delegates questioned whether a passenger within a stationary aircraft prior to take-off would be considered "in the course of carriage." *Id.* at 73-77.

95. Another factor adding to the confusion was the French delegate's failure to follow the normal procedure of reducing proposals for amendments to writing. *Id.* at 75, 80-82.

96. For example, a suggestion that the provision on carriage of goods would be clearer if liability for non-performance were specifically excluded was rejected. *Id.* at 77.

97. Several delegates at a later international air conference urged narrow construction by limiting its effect to the area around the aircraft. See note 23 *supra*.

98. *Evangelinos Slip Opinion*, *supra* note 65, at 18.

99. 405 F. Supp. 154 (D.P.R. 1975).

100. *Id.* at 157; see text accompanying note 46 *supra*.

101. *Evangelinos Slip Opinion*, *supra* note 65, at 18-19; 405 F. Supp. at 157-58.

102. See note 23 *supra* and accompanying text.

103. 528 F.2d at 37 n.17.

104. E.g., Regional Rail Reorganization Act Cases, 419 U.S. 102, 132-33 (1974); *United States v. UMW*, 330 U.S. 258, 281-82 (1947).

105. The denunciation of the Warsaw Convention is relevant to the possible change in the

It would seem more accurate to state that examination of the legislative history does not disclose a sufficiently clear intent on the part of the delegates to guide a court in deciding whether article 17 should be defined with reference to location, activity, control, or a combination of the three. Moreover, reference to the delegates' subsequent statements and those of other authorities is inconclusive. Therefore, the broader, related question of the purpose of the treaty should be examined.

C. *The Purpose of the Warsaw Convention*

The third level of analysis is whether an increase in the scope of liability furthers the general purpose the treaty was intended to serve.¹⁰⁶ A partial ground for the Second Circuit's holding was that the purpose of the Warsaw Convention has shifted from protection of the airline industry to protection of the passenger.¹⁰⁷ The Third Circuit's majority opinion rested its holding primarily upon the language of the treaty and the delegates' intent. However, it did note a policy ground as a factor in its decision—the need for substantial uniformity in the interpretation of a treaty.¹⁰⁸ The dissenting opinion in *Evangelinos*, emphasizing the signatories' original concern for protecting airlines, found policy support for not extending coverage to the terminal.¹⁰⁹

An expressed purpose of the Convention was to create uniformity in international air law.¹¹⁰ It was hoped that this would effect a decrease in litigation and provide a more certain basis for obtaining insurance rates favorable to the carrier.¹¹¹ Sundberg, a noted authority on the Warsaw Convention, has urged that the goal of uniformity was furthered by designating French as the official language of the treaty.¹¹² He argued that this priority would be severely diminished if courts, in construing the treaty, failed to utilize the meaning of a term as developed by French courts.¹¹³ The issue thus squarely presented is whether adoption of the treaty in French compels American courts to defer to decisions of French courts.

Since the Fifth Circuit's influential opinion in *Block v. Compagnie Nationale*

expectations of the United States with reference to the treaty. See notes 137-39 *infra* and accompanying text.

106. See note 79 *supra* and accompanying text.

107. 528 F.2d at 35-36.

108. *Evangelinos* Slip Opinion, *supra* note 65, at 5, 8. See generally discussion of holding in text accompanying notes 65-69 *supra*. The district court similarly rested its decision upon the delegates' intention and failed to discuss the purposes of the Warsaw Convention. *Evangelinos v. Trans World Airlines, Inc.*, 396 F. Supp. 95, 100-02 (W.D. Pa. 1975), *rev'd*, No. 75-1990 (3d Cir., May 4, 1976), motion for rehearing en banc granted, (June 3, 1976).

109. *Evangelinos* Slip Opinion, *supra* note 65, at 10-12.

110. See note 8 *supra* and accompanying text.

111. See text accompanying note 11 *supra*.

112. J. Sundberg, *Air Charter* 244-45 (1961).

113. "If the expressions . . . were to exclude the legal meaning of the terms as used in the French legal system, the binding force of the French text would be reduced almost to nil." *Id.* at 248.

Air France,¹¹⁴ American courts have generally followed its dictum that "[t]he binding meaning of the terms [of the Warsaw Convention] is the French legal meaning."¹¹⁵ Nevertheless, confusion surrounds this requirement. Courts addressing the problem must decide whether the "legal meaning" can be equated with the semantic meaning or whether it also embraces French decisional law. Some courts have chosen the former relationship and limited the application of the official French text to a determination of the accuracy of the English translation.¹¹⁶ Other courts have reasoned that the legal meaning of a foreign word cannot be divorced from its meaning as developed by the courts of that country.¹¹⁷ The ambivalence of the courts on this issue is highlighted by two decisions in the same case where the plaintiff claimed damages under the Warsaw Convention for mental anguish suffered during an aircraft hijacking. Initially, the court indicated that the French legal meaning of the provisions controlled, thereby implicitly obligating itself to consider French law.¹¹⁸ The court later reversed itself on this issue, observing that the inquiry should focus upon the intent of the drafters and the understanding of the parties, rather than upon automatic resort to French jurisprudence.¹¹⁹ Of course, the extent to which a court construing the Warsaw Convention considers itself circumscribed by decisions in the French courts ultimately affects the degree of international uniformity of interpretation.

The leading decision of the French courts on the scope of article 17 is *Mache v. Air France*,¹²⁰ where the plaintiff was injured while walking from the aircraft to the terminal. Although viewing article 17 as extending to the area where the injuries occurred, the court refused to apply the Convention unless an additional requirement were met: that the accident resulted from a risk inherent to aviation.¹²¹

114. 386 F.2d 323 (5th Cir. 1967), cert. denied, 392 U.S. 905 (1968). Block held that the Warsaw Convention applied to charter flights.

115. *Id.* at 330.

116. *E.g.*, *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385, 393-94, 314 N.E.2d 848, 853-54, 358 N.Y.S.2d 97, 104-05 (1974).

117. *E.g.*, *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152, 1155 (D.N.M. 1973). This court went so far as to state that construction of the provisions of the Warsaw Convention required a determination of foreign law. *Id.*

118. *Husserl v. Swiss Air Transport Co.*, 351 F. Supp. 702, 708 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973) (*per curiam*).

119. *Husserl v. Swiss Air Transport Co.*, 388 F. Supp. 1238, 1248-49 (S.D.N.Y. 1975). The court stated: "It is true that this country adhered to the French text of the Convention . . . but, as I now view the matter, that fact does not mean that the French legal meaning of the words or the French legal interpretation of the treaty is binding. . . . The Convention is now part of the federal law of this country. Absent some explicit provision to the contrary, therefore, it should be interpreted in light of and according to that law." *Id.* at 1249.

120. [1968] D.S. Jur. 515, [1967] *Revue Francaise de Droit Aérien* 343 (Cour d'appel, Rouen), *aff'd*, [1971] D.S. Jur. 373, [1970] *Revue Francaise de Droit Aérien* 311 (Cass. civ. 1re).

121. See discussion of case at notes 47-49 *supra* and accompanying text.

The approaches adopted by the Second Circuit and both opinions of the Third Circuit do not clarify the extent to which the judges considered their analyses circumscribed by the *Mache* holding. Although the attention of the Second Circuit was directed to that decision, its opinion makes no reference to *Mache*.¹²² In contrast, the *Evangelinos* majority adopted the *Mache* standard by expressly finding that terrorism taking place within a terminal poses a risk inherent to aviation.¹²³ While this approach renders the majority opinion consistent with that of *Mache*, it does not indicate whether the majority believed consistency to be necessary. The need for uniformity in air law was posed as an additional reason for agreement with the *Day* holding.¹²⁴ The dissent diverged from the majority on both points. It reasoned that terrorism cannot be a danger closely associated with air travel since its site is largely fortuitous.¹²⁵ Since disagreement on this ground rendered *Mache* irreconcilable, the dissent would defer to the French court's holding in the interest of international uniformity.¹²⁶

Thus, on the issue of the controlling status of French internal law, the *Day* and *Evangelinos* opinions provide a spectrum of approaches ranging from the Second Circuit's silence to the *Evangelinos* dissent's deference. It is submitted that *Mache* should not control an American court's interpretation of the Warsaw Convention. Nothing in the text of the treaty or the delegates' statements reflects an intent to create such primacy for French jurisprudence.¹²⁷ Moreover, at least one court has stated that since the Warsaw Convention is part of the federal law of this country, interpretation should proceed by reference to that law.¹²⁸ Finally, the type of risk encountered would appear more directly to determine whether a particular occurrence constitutes an "accident" as the term is used in article 17. This was the approach adopted in cases which first raised the issue of the Warsaw

122. Brief for Appellant at 24-27, *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), cert. denied, 45 U.S.L.W. 3280 (U.S. Oct. 12, 1976) (No. 75-1354).

123. See text accompanying note 68 *supra*.

124. *Evangelinos* Slip Opinion, *supra* note 65, at 5.

125. See text accompanying note 71 *supra*.

126. "I do not believe, however, that the interest in uniform international interpretation of the treaty . . . compels us to follow the Second Circuit's decision in *Day v. Trans World Airlines* . . . since that decision is inconsistent with prior decisions of United States courts and, more importantly, with a decision of the highest court in France. If deference is due in order to achieve international uniformity, I believe we should respect the French interpretation of a treaty which was written and negotiated in the French language." *Evangelinos* Slip Opinion, *supra* note 65, at 13 n.2 (Seitz, C.J., dissenting) (emphasis & italics omitted). The dissent did not refer to the German case of *Blumenfeld v. BEA*, 11 ZLW 78 (Court of Appeal of Berlin 1962), discussed in text accompanying notes 73-74, *supra*. That court explicitly rejected the *Mache* rationale and recognized coverage for all injuries sustained after the carrier requests the passengers to leave the terminal and board the aircraft. It appears, therefore, that uniformity does not exist in international case law.

127. *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385, 393-94, 314 N.E.2d 848, 853-54, 358 N.Y.S.2d 97, 104-05 (1974).

128. *Hussel v. Swiss Air Transport Co.*, 388 F. Supp. 1238, 1249 (S.D.N.Y. 1975).

Convention's application to skyjacking incidents.¹²⁹ Even Sundberg¹³⁰ viewed the controlling French text more as a stabilizing influence than as a rigid rule requiring automatic adherence to each development of French law:

In practice, there is no need for perfect unification of the law, *i.e.* identical meaning of the legal term in all states concerned. The majority of disputes invoking the meaning of a term in different legal systems can be solved by mere approximation.¹³¹

Details, therefore, can be allowed to vary if the basic conceptualism is retained. Reference to the embarking/disembarking concept—despite its lack of specificity—provides a framework around which holdings based upon different factual situations can be expected to vary. Thus, no jurisdiction controls another; each is free to interpret article 17 as long as the fundamental embarking/disembarking test is maintained to achieve approximate uniformity of international air law.¹³²

It has been stated that the overriding purpose of the Warsaw Convention was protection of the developing airline industry from the potential burden of large damage claims.¹³³ The court in *Day* rested its decision, in part, upon modern policy considerations which place the risk upon the party most capable of bearing and preventing the loss.¹³⁴ While the majority opinion in *Evangelinos* expressed general agreement with *Day*, it did not specifically endorse this prong of the Second Circuit's analysis.¹³⁵ The dissent expressly disagreed, finding such theories inapplicable to the Warsaw Convention.¹³⁶

A desire to shield the airlines is clearly inconsistent with a desire to impose liability upon the party most capable of efficiently distributing the loss. To this extent, the *Day* court clearly injected policy arguments alien to the spirit of the Warsaw Convention when drafted in 1929.

Perhaps in recognition of this seeming inconsistency, the Second Circuit observed that the expectations of the parties relative to a treaty's function can change. As evidence of this change, the court looked to the denunciation of the Convention by the United States which led to the adoption of the Mon-

129. E.g., *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322, 1323 (C.D. Cal. 1975); *Husserl v. Swiss Air Transport Co.*, 351 F. Supp. 702, 707 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973) (*per curiam*). See generally *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385, 390 n.4, 314 N.E.2d 848, 851 n.4, 358 N.Y.S.2d 97, 102 n.4 (1974).

130. See text accompanying note 112 *supra*.

131. J. Sundberg, *Air Charter* 249 (1961).

132. One commentator has criticized judicial resort to foreign case law on the ground that it tends to favor the party with the greater legal resources, which is usually the carrier. An additional reason is that no safeguard exists against a highly selective presentation of authority to the court. Sand, *The International Unification of Air Law*, 30 *Law & Contemp. Prob.* 400, 410-12 (1965).

133. See note 8 *supra* and accompanying text. The letter of the Secretary of State relative to this country's initial adherence to the Warsaw Convention which is set out in the text accompanying note 11 *supra* indicates that the United States shared the international solicitude for the air carriers.

134. 528 F.2d at 34.

135. *Evangelinos* Slip Opinion, *supra* note 65, at 5.

136. *Id.* at 19.

tral Agreement and the formulation of the Guatemala Protocol.¹³⁷ The strict liability and higher limitations common to both agreements do reflect a growing emphasis upon passenger protection. However, since the Montreal Agreement was precipitated by the United States' unilateral act of denouncing the Warsaw Convention, it, therefore, expresses only the American government's dissatisfaction with the treaty. Moreover, American disaffection primarily lay in the Convention's low liability limitation, a situation rectified by the Agreement.¹³⁸ Also, only international carriers, not their respective governments, are signatories of the Montreal Agreement. Those countries and the United States remain parties to the Warsaw Convention, which is conduct expressive of support for its policy and purpose.¹³⁹ Thus, while the actions of the United States clearly favor the application of strict liability and the availability of higher recoveries, they cannot necessarily be said to stand for an expansion in the scope of liability.¹⁴⁰

The same may be said of the drafting of the Guatemala Protocol. The United States has been the primary proponent of its provision for absolute liability up to \$100,000.¹⁴¹ Moreover, the threat of United States withdrawal from the international air community is a potent one, since it would result in the unlimited liability of the carrier when sued in American courts.¹⁴² Therefore, the Second Circuit's finding of changed expectations on the part of the international community as evidenced by the drafting of the Guatemala Protocol lacks complete support. It may be more accurate to say that the international community reflects shifts in American philosophy. Thus, a court in this country, searching for the international profile, may find only its face reflected.

On the other hand, even if one accepts the Second Circuit's contention that the policy underlying the Warsaw Convention has shifted to protection of the passenger, such a shift still may be considered irrelevant to judicial determinations of the *scope* of the Warsaw Convention's application. At the same time a particular plaintiff's claim is brought within the umbrella of strict liability, it is also subjected to strict limitations upon the amount recoverable. Application of the Warsaw Convention forecloses alternative theories of liability.¹⁴³ Thus, the policy of passenger protection served in one instance, may be partially frustrated in the next by the damage limitation.

137. See text accompanying note 28 *supra*.

138. See quoted portion of State Department press release in text accompanying note 29 *supra*.

139. See generally pt. II B *supra*.

140. Evangelinos Slip Opinion, *supra* note 65, at 19 (Seitz, C.J., dissenting).

141. Mankiewicz, *The 1971 Protocol of Guatemala City to Further Amend the 1929 Warsaw Convention*, 38 J. Air L. & Com. 519, 522-23 (1972).

142. *Id.* at 521.

143. Warsaw Convention, *supra* note 3, art. 24. This aspect of the Warsaw Convention is illustrated by *Mache v. Air France*, [1968] D.S. Jur. 515, [1967] *Revue Francaise de Droit Aérien* 343 (Cour d'appel, Rouen), *aff'd*, [1971] D.S. Jur. 373, [1970] *Revue Francaise de Droit Aérien* 311 (Cass. civ. 1re), where the plaintiff sought to avoid application of the treaty because alternative theories of liability were available. See discussion of case at notes 47-49 *supra* and accompanying text.

However, one policy argument does provide direct support for an extension of the scope of liability to cover terrorist activity within the airport terminal. As stated by the Fifth Circuit in *Block v. Compagnie Nationale Air France*,¹⁴⁴ the Warsaw Convention was intended by its signatories to be "a body of legislation that could keep pace with the rapid development of air transportation itself."¹⁴⁵ To effect this purpose, the court urged a flexible approach to application of the treaty. The Second Circuit elected this course when it determined that the impetus behind the creation of the Warsaw Convention lay in the parties' desire to create a framework of carrier liability capable of governing not only known, but also future, unknown hazards of air travel.¹⁴⁶ Similarly, the Third Circuit majority refused to confine application of the treaty to risks contemplated by the Warsaw delegates.¹⁴⁷

An accepted principle of treaty interpretation permits a court to find a situation governed by a treaty even though convinced that it was not foreseen by its drafters.¹⁴⁸ It is clear that the delegates to the conference did not foresee the advent of terrorism. However, courts have uniformly recognized that air hijackings fall within the ambit of the Warsaw Convention.¹⁴⁹ Similarly, the drafters of the treaty could not anticipate the revolutionary changes in boarding procedures.¹⁵⁰ Interpretations of article 17 advanced by the delegates themselves would afford coverage to the passengers while crossing the airfield between the terminal and the aircraft.¹⁵¹ Yet, in many instances, use of the jetway as a means of boarding has eliminated this step so that the passenger leaves the terminal and enters the aircraft almost simultaneously. Thus, it is arguable that limitation of article 17 to boarding procedures in use at its adoption, almost a half century ago, could stultify its future interpretation.¹⁵²

V. CONCLUSION

While terrorist attacks within the confines of a terminal do not provide the only context for judicial resolution of the scope of the Warsaw Convention, their sensational nature can be expected to focus continued international

144. 386 F.2d 323 (5th Cir. 1967), cert. denied, 392 U.S. 905 (1968).

145. Id. at 339.

146. See text accompanying note 64 supra. The court indicated that reference to this policy, contemporaneous with the adoption of the Warsaw Convention, could stand as sole support for its holding. *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 37-38 (2d Cir. 1975), cert. denied, 45 U.S.L.W. 3280 (U.S. Oct. 12, 1976) (No. 75-1354).

147. Evangelinos Slip Opinion, supra note 65, at 7.

148. 2 C. Hyde, *International Law* § 531, at 1472 (2d ed. 1945).

149. See note 45 supra. One court observed that "[a]lthough the current problem of hijacking may have been initially unanticipated, it is not unreasonable to assume that the law would leap to fill this logical gap." *Husserl v. Swiss Air Transport Co.*, 351 F. Supp. 702, 707 (S.D.N.Y. 1972), aff'd, 485 F.2d 1240 (2d Cir. 1973) (per curiam).

150. *Day v. Trans World Airlines, Inc.*, 393 F. Supp. 217, 221 (S.D.N.Y.), aff'd, 528 F.2d 31 (2d Cir. 1975), cert. denied, 45 U.S.L.W. 3280 (U.S. Oct. 12, 1976) (No. 75-1354).

151. See note 23 supra.

152. It is interesting to note that a proposal at the Warsaw conference for periodic revision of the Convention was defeated. *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 339 (5th Cir. 1967), cert. denied, 392 U.S. 905 (1968).

attention on the issue. A natural concern for the fate of the victims should not act to cast the airlines in the role of a scapegoat. Courts must continue to resolve questions of the breadth of the Convention's application by reference to the traditional modes of treaty analysis—examination of the language, the drafters' intent and the signatories' purpose. Courts defining the embarking/disembarking test of article 17, however, have drawn varying conclusions based upon their examination of these sources. The result is differing degrees of emphasis upon the factors of the passenger's activity and location, the airline's control and the type of risk encountered. While the standards for applying the treaty which have evolved cannot be commended for their ease of application, it would appear that their complexity followed from the nature of the sources consulted. The language of article 17 is stark and undefined. The only clue to its meaning lies in the fact that a purposeful activity was chosen as the standard for its application. The minutes of the delegates' debate at the Warsaw conference are similarly unenlightening. The delegates rejected the draft provision extending blanket protection to passengers while within the terminal. Moreover, the debates on the substitute provisions failed to clarify whether the delegates intended exclusion of all terminal accidents from coverage. The proposals ranged from an unspecific standard which contemplated judicial definition to a precise test which limited coverage to the interior of the aircraft. The current language of article 17 was formulated by a drafting committee and generated no debate prior to its approval by the delegates. Therefore, the legislative history of article 17 provides little guidance to a court faced with an application of its terms. However, the purposes underlying the adoption of the Warsaw Convention can be viewed as lending support to the interpretations advanced by the Second and Third Circuits. The policy of insulating the developing airlines from large damage awards should not serve as a basis for narrow interpretations of the treaty's scope. Arguably, the policy loses much of its persuasive force once it is recognized that the airlines are long past their infancy. Application of the treaty necessarily confines the plaintiff's recovery to an amount within the Warsaw Convention's monetary limitation. For this reason, broad interpretation of article 17, while expanding the scope of liability, does not impair the Convention's favorable treatment of the airlines. Finally, flexible resolution of the scope issue ensures that the Warsaw Convention will remain a living body of legislation capable of governing a dynamic industry.

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